

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

MCALLEN DIVISION

UNITED STATES OF AMERICA § CASE NO. 7:19-CV-403
 § MCALLEN, TEXAS
VERSUS § THURSDAY,
 § DECEMBER 12, 2019
FISHER INDUSTRIES, ET AL § 1:38 P.M. TO 2:14 P.M.

STATUS CONFERENCE

BEFORE THE HONORABLE RANDY CRANE
UNITED STATES DISTRICT JUDGE

APPEARANCES: SEE NEXT PAGE

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1 McALLEN, TEXAS; THURSDAY, DECEMBER 12, 2019; 1:38 P.M.

2 THE COURT: All right. As my computer is logging
3 on, I'll go ahead and call the case: United States of
4 America versus Fisher Industries, et al, Civil Action
5 No. 19-CV-403.

6 Announcements for the Government first?

7 MR. WARNER: Good afternoon, Your Honor. Paxton
8 Warner, John Smith, and Daniel Hu, on behalf of the United
9 States of America.

10 THE COURT: All right. And then representing
11 Fisher Industries and the Fisher Defendants also?

12 MR. FIELDER: Ernest Fielder on behalf of Fisher
13 Industries.

14 THE COURT: All right.

15 MR. KIRBY: Your Honor, Lance Kirby on behalf of
16 Neuhaus and Sons.

17 THE COURT: All right. Thank you-all for being
18 here this morning -- or this afternoon, excuse me.

19 So this was a -- the purpose of this was sort of a
20 status conference to see where we are. There was -- seemed
21 to be some urgency on behalf of the Fisher Defendants to get
22 this hydrology information to the Government approved,
23 disapproved, modified so that they can could then get the
24 okay by the boundary commission to proceed with some form of
25 their project as planned or as modified.

1 The morning of the last hearing, my recollection
2 was that there was some 12-page hydrology analysis that was
3 submitted. We were unsure about all that or how that would
4 play out.

5 MR. WARNER: So it was --

6 THE COURT: So tell me where we are, Mr. Warner.

7 MR. WARNER: Yes, Your Honor. It was -- it did
8 not contain the two dimensional modeling that is required
9 and it was still lacking in terms of the theory or the
10 method that needs to be used.

11 So IBWC sent a very detailed list to Mr. -- and I
12 don't want to mis-pronounce, Mr. Gempsh (phonetic), I think
13 is his name, letting him know what was short on that today.
14 We got those 12 pages back and a couple of things have been
15 cleared up and then they filled in where they're going to
16 add the modeling.

17 THE COURT: Okay.

18 MR. WARNER: So there's some -- there is something
19 called "LIDAR" that really tracks the terrain of the
20 floodplain that needs to be used and so --

21 THE COURT: That's a software program? What is
22 Lidar?

23 MR. WARNER: LIDAR has -- if you know --

24 MR. FIELDER: It's a radar based system.

25 THE COURT: Okay.

1 MR. FIELDER: Often used with respect to weather.

2 THE COURT: Sure.

3 MR. FIELDER: That will provide elevations and
4 contours within a two or three dimensional space.

5 THE COURT: Okay.

6 MR. WARNER: So part of what has to be shown for
7 the IBWC to plug into its modeling system is cross-sections
8 every so often that includes the bank, all the way down to
9 the middle of the river, and then up along the floodplains.
10 There's really no way to get Mexico's, but what we've told
11 them is we'll just concentrate on the US and the US side and
12 that'll be fine.

13 So my understanding from our meeting that we had
14 yesterday and based on what they sent to us today is that
15 they are trying to get the LIDAR modeling. We are also
16 trying to get a form of that. We understand the FEMA may
17 have the LIDAR modeling for that area, and so we're checking
18 with FEMA. It's a different agency.

19 So, but we're asking if we can share that. If we
20 can, that will speed it up. If not, then they need to get
21 the LIDAR modeling. They've done the river bank.

22 THE COURT: Okay.

23 MR. WARNER: Because I understand -- as I
24 understand it's now you do the floodplain and then they have
25 to show in a flood event that these different cross-sections

1 without their project and then with their project what the
2 deflection rates should be. So we're probably still a
3 couple of weeks away.

4 THE COURT: Do you want to add anything to that or
5 correct anything that was said, or is that accurate?

6 MR. FIELDER: I was not at the meeting yesterday,
7 but nonetheless we've attempted to be completely transparent
8 with the Government. We invited them to the site. They
9 walked the site. I gave them two hours. This was not two
10 hours of attorneys arguing about the shape of the table or
11 who sits where, we were not even present. We allowed them
12 to ask any questions they wanted of our clients, look at any
13 documents we had, open book policy.

14 With respect to the LIDAR, we would suggest the US
15 Government already has that information. They've had that
16 information, had it for years in association with creating
17 what is essentially a reservoir down there, flood control
18 gates, spillways -- they have all that information.

19 THE COURT: Okay.

20 MR. FIELDER: And thus, we see this insisting that
21 we now do it as potentially delaying this and this is
22 something that should not be delayed because we think at the
23 end of the day this is not a close call.

24 THE COURT: Sure.

25 MR. FIELDER: We think at the end of the day this

1 is -- not only does it not adversely impact surrounding
2 properties or Mexico, it ameliorates flooding in the area.

3 THE COURT: Uh-huh.

4 MR. FIELDER: It makes it better, not worse, and
5 thus we see this as to a certain extent some more delays by
6 the Government, but nonetheless, we're doing what we can to
7 cooperate.

8 THE COURT: So how do we ensure that this -- the
9 FEMA, the Government already has this information and FEMA
10 gets it over to your agency, whoever needs it over here,
11 what --

12 MR. WARNER: We've asked --

13 THE COURT: I mean, how do you expect the
14 private --

15 MR. WARNER: -- it's the software of FEMA, so
16 everybody --

17 THE COURT: -- the private citizen to have greater
18 access to something that's held by the Government than
19 another Government arm?

20 MR. WARNER: We're hopeful. I mean, unless --

21 THE COURT: Right.

22 MR. WARNER: -- the Court's going to issue an
23 Order. We're doing the best we can to follow the protocols
24 that we have with FEMA to get it. Just because FEMA has it,
25 doesn't mean IBWC has it.

1 THE COURT: Sure.

2 MR. WARNER: And so IBWC in any project that is
3 proposed in the floodplain asks the party that's doing the
4 project, get the -- we need LIDAR results --

5 THE COURT: Okay.

6 MR. WARNER: -- that we can then plug into our
7 model with the cross-sections, and so we haven't asked
8 anything else of Fisher than we've asked of anyone else.

9 THE COURT: Well who else is doing this? I mean.

10 MR. WARNER: Who else is building 3-1/2 miles of
11 fencing? But Your Honor, we are going above and beyond. We
12 would not normally do this for a party, but when we found
13 out that FEMA does have LIDAR of the area, we've reached out
14 to them to see if they will share that with us so that we
15 can share it with Fisher and maybe speed this process up.

16 So we're trying. The Government is not delaying
17 on this.

18 THE COURT: Were you inviting a Court Order to
19 that effect? I mean, you suggested, well, maybe if we got a
20 Court Order FEMA could get it to us.

21 MR. WARNER: Judge, if FEMA says no, we're stuck.
22 That's all I'm saying. And they haven't said yes or no.

23 THE COURT: I know they're a separate party. I
24 mean, the United States of America is the party here. It's
25 not like their the separate -- like the postal service is

1 kind of independent, but FEMA would --

2 MR. WARNER: I just wanted the Court to
3 appreciate, we can ask, but we can't force if FEMA says no,
4 that would violate our protocols -- FEMA's protocols.

5 THE COURT: So how do we get past that? It seems
6 that if FEMA is unwilling to give it to you, that they're
7 going to be unwilling to give it to a private developer.

8 MR. WARNER: They may not be. We've reached out
9 to them. That was one of the things that we discussed on
10 the river bank yesterday was that we would try to obtain
11 that for them, but if we can't, then we need to do a LIDAR
12 study, which will probably take a couple of weeks.

13 THE COURT: So you're -- the alternative if FEMA
14 for some reason can't give it or let's even think of a
15 hypothetical where it's destroyed, doesn't exist or
16 something, a private citizen can then hire someone to
17 perform this LIDAR analysis?

18 MR. WARNER: Correct, Your Honor.

19 Correct. It's expensive, but so they knew that,
20 though, Your Honor. They actually went and met with the
21 Commissioner a couple of months ago. They knew that they
22 needed modeling. They knew -- they met with them at that
23 time, told them what to present, how to present it, and
24 instead they went forward, and so --

25 THE COURT: But also, you know, I guess I've

1 always been kind of mind that you know, you don't make
2 somebody jump through a hoop just to make them jump through
3 the hoop, so if you already have it, so --

4 MR. WARNER: Your Honor --

5 THE COURT: -- so we have it, but you're going to
6 have to go do it yourself. That seems petty.

7 MR. WARNER: The IBWC does not have it yet. The
8 IBWC found out about it, asked if FEMA could share it with
9 them, because it is a pretty big deal that FEMA has gone out
10 and done this.

11 THE COURT: Uh-huh.

12 MR. WARNER: I mean, to my knowledge, they haven't
13 done that, if ever -- if ever? We don't know, but --

14 THE COURT: Can you do a FOIA request and get it
15 anyway? I mean, it's --

16 MR. WARNER: Well, I'm hopeful we're going to get
17 it Judge, --

18 THE COURT: I mean, --

19 MR. WARNER: -- but regardless --

20 THE COURT: -- probably some of these reporters
21 could get it just for Freedom of Information Act request.

22 MR. WARNER: The point is -- the point is, Judge,
23 they need to do that --

24 THE COURT: Sure, okay, but you --

25 MR. WARNER: -- before --

1 THE COURT: -- everybody knows that. So how do we
2 get it done?

3 MR. WARNER: -- before they move forward and so to
4 that end, I've got a couple of very short videos I would
5 like to show the Court. One is three minutes, and the other
6 is maybe about 35-40 seconds.

7 We just have some concerns, Your Honor, about
8 what's going on at the site. While we're waiting for the
9 modeling to come in so that we can then run our systems.

10 The IBWC has committed to us that they will
11 elevate this to the highest on the list, so as soon as they
12 get the modeling in from Fisher, Fisher goes to the top of
13 the list and they will work on that right away to analyze it
14 and get either a no objection letter or a modification
15 letter, if it's required, or if it's just not going to work,
16 then it'll be an objection letter.

17 THE COURT: So -- okay, so they need a LIDAR
18 study?

19 MR. FIELDER: Yes.

20 THE COURT: Okay. So that -- in addition to the
21 LIDAR study what else then is needed? I guess just some
22 analysis that coordinates with that LIDAR study?

23 MR. WARNER: And then as I understand it, Your
24 Honor, and I have -- we call him Dr. Mooney, just because
25 it's easier to say that, than his full name, Your Honor, but

1 we have him here if the Court wants testimony. I mean, I
2 think we can just explain to the Court once you get this
3 LIDAR, you plug that into the model with the cross-sections.
4 You show the cross-sections at the flood -- the flood rate,
5 the cubic feet per second that they've got in the model.

6 You show what that normally would be, then you
7 plug your project into that with those different cross-
8 sections showing all the way up to the levee and then you
9 show what the flood rate would be with your project.

10 THE COURT: Sure.

11 MR. WARNER: And then the IBWC will take that --
12 and that was a very, very simplistic explanation, Your
13 Honor, but the IBWC will then take that, analyze it, look at
14 deflection rates, and see if that meets the standards under
15 the Treaty.

16 THE COURT: All right. So and I guess Fisher is
17 sort of ready to do that once they get this LIDAR study, or
18 no?

19 MR. FIELDER: We submitted what we believe to be
20 an appropriate hydraulic study of the system. We believe
21 that the Government knew months ago that this LIDAR study
22 was available, would be needed.

23 And this study consists of data points. FEMA
24 conceivably could email that to the Government today. They
25 could run it through their model and we could be done

1 tomorrow morning.

2 MR. WARNER: No.

3 MR. FIELDER: And --

4 MR. WARNER: We could send it to them, they could
5 then do the modeling and send it back to the Government for
6 our analysis.

7 THE COURT: Is it that quick? The modeling that
8 quick?

9 (Many voices at the same time.)

10 THE COURT: One at a time.

11 (Many voices at the same time.)

12 THE COURT: Okay. So.

13 MR. FIELDER: I apologize for the hyperbole.

14 THE COURT: Sure.

15 MR. FIELDER: We're all running the same basic
16 models, we're all running the same basic program. What's
17 lacking essentially -- a nail sketch is this LIDAR data.

18 THE COURT: Okay.

19 MR. FIELDER: Plug in and this thing -- you know,
20 the -- when I run the model and they run the model, you use
21 the same assumptions, the result is the same every time and
22 it's repeatable.

23 So we're suggesting it's economic waste for us to
24 spend tens and tens of thousands of dollars to produce data
25 that is already in FEMA's hands.

1 This is easy. I would suggest that the Court
2 could potentially --

3 THE COURT: I would tend to agree with you on
4 this.

5 MR. FIELDER: -- order FEMA to simply release that
6 data so we could move forward. 48 hours, 72, four days,
7 doesn't matter, but it certainly is a much better outcome
8 than wasting weeks and weeks and weeks trying to find a
9 service provider, try to get them up-to-speed, and paying
10 all that money. Because I guess the backdrop -- understand,
11 we've got 70 guys out there at a construction site that's
12 been shut down. We've got tens of --

13 MR. WARNER: It's not shut down, Judge.

14 MR. FIELDER: -- we've got --

15 THE COURT: So, but look. I mean, we would say --
16 I mean, I would say, look, as part of Rule 26 disclosures,
17 you've got to give them that LIDAR study anyway.

18 MR. WARNER: If we have it.

19 THE COURT: Well, the United States of America is
20 the party here. It has it.

21 MR. WARNER: I understand that.

22 THE COURT: You're telling me FEMA has it. That
23 is the United States of America.

24 MR. WARNER: Okay.

25 THE COURT: Isn't it?

1 MR. WARNER: It is. It is.

2 THE COURT: So you have it.

3 MR. WARNER: But every agency is different, Judge,
4 and they don't all share the same information.

5 THE COURT: I understand, but it is the -- you are
6 the party here.

7 MR. WARNER: I understand.

8 THE COURT: It's required to be -- I mean, again,
9 this is something a Rule 26(a) disclosure you need to give
10 up and so you mentioned that you made a request.

11 MR. WARNER: We have.

12 THE COURT: When was that? What's been the
13 response?

14 MR. WARNER: It was my understanding that we made
15 the request yesterday. They were looking into that today.
16 We were trying to get an answer by court time, we didn't get
17 the answer. So we're --

18 THE COURT: Are you dealing with an agency
19 representative or in-house counsel for the agency, or how
20 does that even work?

21 MR. WARNER: So our agency people know someone in
22 their agency and they're working it, Judge.

23 THE COURT: So your agency -- the US Attorney's
24 Office or the --

25 MR. WARNER: No, the IBWC.

1 THE COURT: The IBWC, okay, okay.

2 MR. WARNER: Yes.

3 THE COURT: And -- all right, and I assume they
4 probably work together. I mean, this is a pretty common
5 thing that they work together, and so you expect to hear
6 back soon?

7 MR. WARNER: We wanted to hear back today, Your
8 Honor.

9 THE COURT: All right. Mr. Hu, did you want to --

10 MR. HU: Your Honor, may I just tell one thing on
11 the LIDAR study?

12 THE COURT: Sure.

13 MR. HU: My clients advise me that this is not --
14 it's about \$2,000 a square mile. It's not hideously
15 expensive. In the context of what they say is a \$40 million
16 project, \$2,000 a square mile for this analysis is not a lot
17 of money in that context, first.

18 And second, my understanding that this doesn't
19 take a long time. They may be able to get it done in, what,
20 a day and a half or so?

21 THE COURT: Well, you have to get somebody to do
22 it, but you already have it. You're required to provide.

23 MR. WARNER: We understand, Your Honor.

24 THE COURT: I mean, it seems like -- again, your
25 role here is just to make sure that somebody building in a

1 floodplain is doing so in compliance with the law. You
2 don't really -- you're not an advocate for one position or
3 another position.

4 If you have this information, it needs to be just
5 shared. I mean, we require it under our Rules. And so I'll
6 ask that you find out as soon as possible and report back to
7 the Court, maybe tomorrow?

8 MR. WARNER: Okay.

9 THE COURT: And if you get resistance from FEMA,
10 then I feel like an appropriate Court Order against the
11 Government would be helpful. I mean, --

12 MR. WARNER: Well, we will make a note of it.

13 THE COURT: -- maybe you can explain to them that
14 the Rules of Civil Procedure require the disclosure of this
15 kind of information by the Government. You can't use it as
16 a sword and a shield, and so it needs to be produced. If
17 you're going to pursue this suit and you have this
18 information, I feel like in fairness it needs to be given up
19 and I believe required by our Rules.

20 All right. So what -- okay, so where else are we?
21 I mean, this is --

22 MR. WARNER: So Your Honor, we're taking issue
23 with some of the things that are going on at the
24 construction site, and I have two short videos that I would
25 like to show the Court.

1 THE COURT: Did you file a Motion for Contempt,
2 or?

3 MR. WARNER: I did not, Your Honor.

4 THE COURT: Well, how do you -- so are we prepared
5 to respond to this? I mean, I'm happy to look at it, but I
6 feel like the appropriate, if you're not happy with what's
7 happening there, if you believe there's been a violation of
8 the Court's Restraining Order, then file appropriate motion.
9 I'll set it for immediate hearing, and we can have evidence
10 and I can hear it; and the opposing party can have an
11 opportunity to respond what it is that you are going to
12 suggest.

13 Do you want to orally just give me what you think
14 is happening, and I'll be prepared --

15 MR. WARNER: So Your Honor, when the Court issued
16 its Temporary Restraining Order on December 5th, they came
17 and they were not allowed to grade or shave the bank
18 anymore, okay?

19 THE COURT: All right. This Order -- let me --
20 this Order was an Order that was provided to the Court by
21 agreement of the parties.

22 MR. WARNER: That is correct, Your Honor.

23 THE COURT: So I didn't make any --

24 MR. WARNER: Absolutely agree with that, yes.

25 THE COURT: Right. So this is what you-all agreed

1 to, and I remember there was no shaving of the bank.

2 MR. WARNER: Yeah, no shaving agreed.

3 THE COURT: But they could seed it.

4 MR. WARNER: So they wanted to seed the section
5 that had already been graded.

6 THE COURT: Uh-huh.

7 MR. WARNER: Because even they appreciate the fact
8 that it's unguarded right now and they need to get some seed
9 in there --

10 THE COURT: Yeah, sure.

11 MR. WARNER: -- to hold it together, okay?

12 So what happened was we had told the Court we
13 believe the bank was the vertical structure, and then
14 horizontal probably belonged to the landowner, okay?

15 THE COURT: Uh-huh.

16 MR. WARNER: So what they have done is they've
17 left a four-to-five foot strip and then they literally have
18 dug out behind that and graded behind that, and now we've
19 got an unprotected bank that in a flood event is going to
20 just completely give way.

21 And that's -- you know, are they grading the bank?
22 No, but they've completely weakened behind our bank now in
23 anticipation that this model, which they can't produce to
24 us, is going to somehow pass the Treat requirements.

25 THE COURT: Well, but okay. So is that shaving of

1 the bank? I would think you would concede it's not.

2 MR. WARNER: No.

3 THE COURT: Is it trenching is permitted by the
4 Order?

5 MR. WARNER: But not trenching that's permitted by
6 the Order, Your Honor. But the trenching that was permitted
7 by the Order --

8 THE COURT: Well -- what does it say?

9 MR. WARNER: -- was to put rebar in and to lay
10 down the cable. And this is completely separate from that
11 trench, and I can show the Court that on the video, if the
12 Court wants to see it.

13 MR. SMITH: Your Honor, the only reason for the
14 trenching that they're doing and the way -- I mean, they're
15 digging out more than four or five feet of earth. The only
16 reason for doing it is to shave the bank down so that when
17 they knock down that last little bit of bank, that it's
18 completely shaved down.

19 So you can't go back and repair this if there's a
20 problem with it. What they're doing is shaving all the way
21 to the little edge of the bank, but it has nothing to do
22 with building their wall or putting rebar in for any of
23 that. It's all for preparation of just shaving it down.

24 MR. WARNER: That's what they're doing, Judge.

25 MR. FIELDER: If I may, Your Honor?

1 THE COURT: Sure.

2 MR. FIELDER: This is on the Neuhaus land, not the
3 bank, this is on the farmer's property. The Order entered
4 by this Court said, "Are permitted to clear and grub --
5 clear and grub, trench, comma, place rebar and conduit in
6 the trench, and seed and plant on the subject property."

7 And in no way said we only get to trench where
8 they desire. It doesn't say we only get to trench for the
9 purposes of laying rebar, purposes of laying conduit, and as
10 the Court observed, this was the Order we agreed to.

11 And we didn't hide any of this from them. We
12 haven't walked the property yesterday -- we're not sneaking
13 around in the dark doing this. This was open, obvious. We
14 talked to them about it. They've seen videos of it. This
15 is nothing, nothing secret, nothing untoward, and it doesn't
16 violate the Order.

17 THE COURT: It doesn't seem to violate the Order,
18 but it seems to be something that perhaps wasn't
19 contemplated when you-all were agreeing to this and now you
20 wish -- you may seek to modify the Order, which I'm happy to
21 listen to.

22 MR. WARNER: Your Honor, at the last hearing, they
23 said can we keep trenching? Because we want to put the
24 rebar down and we had a discussion about that, and --

25 THE COURT: All right.

1 MR. WARNER: And over our objection, the Court
2 said, I'm going to allow them to dig that trench -- no
3 concrete, though, but I'm going to let them put the rebar
4 down in there, but no concrete and no wall.

5 THE COURT: I don't remember that being over your
6 objection. I thought you were okay with that.

7 MR. WARNER: Judge, we did not want the trench,
8 but the Court pointed out that farmers probably dig trenches
9 on their land and that you were going to allow it. And so
10 we said, okay.

11 And so this is the big CAT digging it out. So you
12 allowed them to clear and grub, which I would argue is
13 cleaning of the bank, but now, they're going in and doing
14 this behind the bank.

15 THE COURT: Okay. You say I allowed them. This
16 was an Agreed Order presented to the Court. I was advised
17 this is the agreement of the United States of America and
18 the property owners and construction company that's handling
19 the project, so I didn't quibble with the language. There
20 were some things I didn't really --

21 MR. WARNER: (Indiscernible).

22 THE COURT: -- honestly, I scratched my head a
23 little bit when I was reading through it. As you'll notice,
24 I did add a few words to make sure this was -- as against
25 the Fisher parties and the Neuhaus and not the -- because

1 there was some generic Defendants language, so I just
2 clarified a little, but I didn't change anything
3 substantively, I -- as I'm reading and trying to figure out
4 what could possible go wrong, I -- you know, myself had
5 thoughts about this, but I know you-all met for hours and
6 came up with this agreed language.

7 And not to want to interfere with what you-all
8 agreed to, I simply signed it, --

9 MR. WARNER: So Judge, maybe --

10 THE COURT: -- but perhaps there's a few things
11 the Government needs to do, maybe seek to modify the TRO,
12 and then -- or maybe seek to hold the Defendants in contempt
13 for violating it, if you think that exists.

14 MR. WARNER: Right. Judge, we just want them to
15 stop doing this.

16 THE COURT: You know, I'm happy to --

17 MR. FIELDER: Your Honor, I talked to them before
18 the hearing. If that's what we're here about today on his
19 end, we'll agree. We'll stop doing that. We will stop
20 doing that. This is not a big deal. We will agree to stop
21 doing that. It doesn't violate the TRO, we had no real
22 notice of it. It came through in an email this morning, and
23 the email said to me from the US Attorney's Office, even
24 suggested, technically this doesn't appear to be a violation
25 of the TRO.

1 It's no big deal. If they want us to stop it,
2 we'll stop.

3 MR. WARNER: We didn't contemplate this.

4 THE COURT: Right. That's what it appears that it
5 wasn't contemplated. Fisher is --

6 MR. WARNER: When we left the Court --

7 THE COURT: They're offering to stop.

8 MR. WARNER: Okay.

9 THE COURT: I mean, can we accept -- I mean, do
10 you want to accept their offer to stop, or?

11 MR. WARNER: I would like them to stop, Your
12 Honor, yes.

13 THE COURT: All right. Do you want to send me an
14 amended TRO with that --

15 MR. WARNER: Yes, Your Honor, we would.

16 THE COURT: -- that minor language change?

17 MR. FIELDER: Yes.

18 THE COURT: Okay. Another thing you didn't have
19 in the TRO, they expire on their own, but then if I don't
20 have a hearing on a preliminary injunction, they expire on
21 their own terms, certain number of days.

22 Also, I believe to be enforceable, I need to
23 either have a bond or make a finding that a bond wasn't
24 needed. There wasn't anything like that in there, either.
25 Again, I assumed you-all had figured it all out since it was

1 agreed to. I didn't call you back in after 5:00 when I got
2 this Order -- proposed Order.

3 But it seemed to have a lot of problems.

4 MR. FIELDER: If I may?

5 THE COURT: Yes.

6 MR. FIELDER: I know this was brought up at the
7 original hearing. I want to reiterate this to the Court.

8 We have 70 people out there, okay? There's stuff
9 they can do, but that's coming rapidly to an end. We've got
10 tens of millions of dollars' worth of heavy equipment out
11 there on a \$40 million project -- excavators, trucks, tanks.

12 THE COURT: Uh-huh.

13 MR. FIELDER: Okay. We don't think we're wrong.
14 We do not think we're wrong at all, but if we are, we agree
15 to post a bond as long as we can go forward and start
16 pouring concrete. We'll post a bond in the amount it will
17 cost to tear that concrete back out, okay? We're happy to
18 agree to an Order that if we're wrong, Fisher Industries and
19 their subsidiaries will remove the wall and as far as
20 possible, restore this property, okay?

21 We need to get back to work. We need to get back
22 to working because at this point in time, there's zero
23 evidence suggesting anything we're doing on that property is
24 going to adversely affect Mexico, Treaty relationship,
25 neighboring properties -- any of that.

1 And we want to get back to taking care of business
2 here. So I mean, we're talking about putting up a bond to
3 secure 100 percent of the cost of restoring this property as
4 it pertains to the wall.

5 THE COURT: All right. I don't think we're there
6 yet, I mean, I think the Government appreciates your
7 generous offer, but let's see if we can get this hydrology
8 study done in the next few days, get this LIDAR report study
9 to the Defendants, let them plug in their numbers. It takes
10 48 hours. If you get it tomorrow, maybe you can have it
11 done by Monday.

12 MR. WARNER: It's 48 hours for them to run their
13 model --

14 THE COURT: Sure.

15 MR. WARNER: -- and then they have to get it over
16 to us.

17 MR. FIELDER: And then there's no time period for
18 them to review or respond. We could be here six weeks from
19 now -- eight weeks.

20 THE COURT: Well, I'm going to drag you back here
21 next week just to make sure we're on track here and we're
22 moving as quickly as we can. There's a lot of moving parts
23 here, and I'm trying to balance the different interests of
24 private citizens, the United States, and the interest of our
25 sister country to the South that might be affected.

1 MR. FIELDER: And that's why we're suggesting the
2 bond so we don't have to go through any of this. We can
3 save all the time and energy of fussing and fighting,
4 showing for Status Conferences and arguing -- driving all
5 the way or flying all the way here to argue about
6 non-technical violations. Let us post a bond. We'll post a
7 bond 150 percent of the cost of pulling down that wall, if
8 we can start construction, start pouring concrete.

9 THE COURT: Well, let the Government consider
10 that.

11 AUSA: Your Honor, they just said -- he just said
12 -- Counsel said we will remediate to the best of our
13 ability, but we can't get it back to what it was, and that's
14 the problem. If this does not pass the hydraulic studies,
15 then they cannot get it back to what it should be.

16 THE COURT: Why couldn't they?

17 AUSA: We're already lost. This is the bank,
18 what's left. And this is all -- all of this is just for
19 shaving to make it the way that it was in the first pictures
20 you saw, so we've already lost that much.

21 THE COURT: Well, wait. But why -- I mean, I
22 think what counsel is suggesting is that they'll put the
23 dirt back. They would replant the trees and the grass that
24 were once there. They are going to put it back --

25 (Many voices at the same time.)

1 THE COURT: -- to where it was previously.

2 MR. WARNER: They can't put a five-foot bank back.

3 MR. FIELDER: We can't return -- we can't restore
4 trees that have been grubbed off this property. We can't
5 restore plants that have been grubbed or cleared off that
6 property. Those plants are gone.

7 We can reseed, we can replant. But in Texas
8 (indiscernible) understand that they're talking about we
9 can't rebuild a vertical bank. The very vertical bank down
10 on the Rio Grande that is eroding away with every storm.
11 The very vertical bank along the Rio Grande that both wakes
12 are slapping against and washing away, the very vertical
13 bank that lacks stability as opposed to a five-by-one slope,
14 the engineering approved response to wakes and clogs, the
15 stable shoreline is what we are trying to do.

16 So true, we --

17 THE COURT: One that doesn't erode.

18 MR. FIELDER: -- that doesn't erode, true. It
19 will be a struggle for us to restore the horribly
20 inefficient and eroding away vertical banks that are
21 continually slumping off into the Rio Grande and you can see
22 it directly across the river from our project. We can't do
23 that. Those are --

24 AUSA: Those are the vertical banks that are
25 protected by the Treaty and that's the purpose of the Treaty

1 is not to create manmade causes that are either going to
2 change the boundary line or cause deflection and erosion on
3 the Mexican side or the American side.

4 THE COURT: But I thought the -- from the last
5 hearing, the vertical bank really isn't -- I guess where it
6 is isn't the issue. It's not -- there can't be something
7 done that changes the international boundary.

8 And so if this design of a bank doesn't change the
9 boundary, then shaving isn't a problem.

10 MR. WARNER: No. It's two things. Number one,
11 it's changing the boundary. And number two, it's also --

12 THE COURT: Right. Well, how is it?

13 MR. WARNER: -- causing deflection that will cause
14 erosion on the Mexican side. That will then eventually
15 change the boundary.

16 THE COURT: Okay. You say that, but counsel for
17 Fisher says absolutely the opposite. Says this design does
18 not cause deflection or erosion. This is sort of a beach
19 access, as you -- and much less ability to erode, to decay,
20 to fall.

21 MR. WARNER: Counsel, Fisher and Fisher when they
22 met with the IBWC in October and were told that they needed
23 to do a hydraulic study, had done the hydraulic study to
24 show us that this would not cause those problems, we
25 wouldn't be here. They had the opportunity to do that, to

1 come in here with their sense of bravado that we're slowing
2 them down and trying to prevent this, they've known since
3 October that they had to do the hydraulic study. They do
4 work with IBWC in other places. They know the requirements.

5 THE COURT: Sure. But nobody here -- I mean, I
6 hear a bunch of claims by both sides, I don't know what the
7 reality is, whether this engineering design is a more
8 stable, better, less eroding design, or whether the vertical
9 shoreline that currently exists is a more stable design.

10 MR. WARNER: That's why you run a model.

11 MR. FIELDER: You run a model.

12 MR. WARNER: You run a model. You show the cross
13 sections and then you go to the IBWC and if it truly is
14 better, you show the IBWC. Look, it's even better, and then
15 maybe IBWC says we don't object.

16 THE COURT: Right. I'm skeptical as to
17 everybody's claims, so no offense, but I don't really
18 believe anybody because that's just my nature. I'm
19 skeptical of everything anybody ever tells me.

20 So, but look, let's get this back on track. So
21 the purpose of this hearing was to make sure we're moving as
22 quickly as we can in getting to the IBWC the hydrology
23 information that was required of them. Some information has
24 been given. What is lacking is an analysis using this LIDAR
25 study.

1 I expect the Government to produce that LIDAR
2 study. It's in their possession. It's required by our
3 Civil Rules of Procedure to do so under Rule 26, and
4 therefore, I expect them to provide that to Fisher
5 Industries as quickly as possible.

6 I understand, a bit large behemoth bureaucracy is
7 it's sometimes difficult to get things done quickly with
8 layers of approval, and so I'll just ask the Government to
9 be as expeditious as possible in getting that, and if it
10 isn't provide by at least, what, Monday? Tuesday? Then
11 I'll enter an Order requiring it with a very short timeline.

12 If the only impediment in providing it is they
13 insist there be a Court Order requiring its disclosure,
14 somebody can let the Court know that.

15 MR. WARNER: We'll do that, Your Honor.

16 THE COURT: I know sometimes that's an agency or
17 party would like to have that. I'm happy to do that.

18 Okay. So that's number one. Let's try to get it
19 by Monday or Tuesday. Let's shoot for Monday, but if not,
20 Tuesday.

21 MR. FIELDER: Tuesday?

22 THE COURT: Yes.

23 In the interim, if the parties could agree on this
24 modification, I think the Fisher Defendants offered to stop
25 doing this sort of trenching, if you-all want to enter an

1 Amended Restraining Order, I'm happy to do that. Please
2 agree on a date which it expires.

3 MR. WARNER: Yes, Your Honor.

4 THE COURT: If the bond is not needed, probably
5 it's not because the Government is large enough they could
6 afford to pay any damages. I don't really think the
7 Government needs to put up a bond, but --

8 MR. WARNER: I believe that's the law, case law,
9 Your Honor.

10 THE COURT: Okay. So to me we just need to --

11 MR. WARNER: Okay.

12 THE COURT: It was just a question of mine whether
13 we needed to address that. It's normally required.

14 So if you'll enter -- if you-all come to some
15 Agreed Restraining Order, then I'll just enter that and then
16 we'll regroup here next week. Yeah, next week is --
17 Wednesday or Thursday of next week? You're welcome to
18 attend by phone, although you know, maybe it's better that
19 you be here anyway.

20 MR. WARNER: Would the Court entertain Wednesday?

21 THE COURT: Yeah, Wednesday works --

22 MR. FIELDER: I've actually got some depositions I've
23 got to take on Wednesday.

24 THE COURT: Sure.

25 MR. FIELDER: Thursday works much better for me.

1 THE COURT: That's exactly a week from today.

2 MR. WARNER: Yes, I --

3 THE COURT: Does that work with you, Mr. Warner?

4 MR. WARNER: I have a border wall meeting in
5 Fort Worth, Your Honor, that's -- I mean, I need to attend
6 that.

7 THE COURT: Well, you need to. Could somebody
8 else cover this for you?

9 I mean, I could also patch you in by phone -- by
10 Skype.

11 (Many voices at the same time.)

12 THE COURT: I mean, if you could break from your
13 meeting, I can patch you in.

14 MR. WARNER: Okay. I can certainly call in, Your
15 Honor. I may be tied up to the mediation.

16 THE COURT: You're going to mediation?

17 MR. WARNER: I think.

18 THE COURT: Mr. Smith?

19 MR. SMITH: We'll get it figured out, Your Honor.

20 MR. WARNER: Yeah.

21 THE COURT: Well, I don't want to handicap you.

22 MR. WARNER: Yeah, one of us will be here.

23 THE COURT: All right. It sounds like everybody's
24 got very important things to do next week and it's really
25 the last week before the holidays, so we need to be as

1 expeditious as we can.

2 Again, hopefully the studies get turned over.

3 You-all can tell me things are moving along, no need for the
4 hearing. We think we can get this done or worked out --
5 tell me that if that's where you are. I can then bump the
6 hearing a few more days if you feel like, you know, things
7 are progressing, --

8 MR. FIELDER: We'd love to do a bond.

9 THE COURT: All right.

10 MR. FIELDER: We'd do a bond. I agree -- I
11 suggest to the Court, we may -- we could have a \$500,000
12 bond on file with this Court by Friday.

13 MR. WARNER: Judge --

14 THE COURT: 500,000 doesn't seem like very much.

15 MR. FIELDER: That's the beauty of our design.
16 The ease of which is it can be removed. And that's what's
17 going to be adopted nationwide.

18 THE COURT: All right.

19 (Laughter.)

20 THE COURT: Yes. All right. So you-all are free
21 to work some -- talk about that amongst yourselves if
22 you-all want to pursue that.

23 Otherwise, be back here same time, 1:30, next
24 Thursday. If you-all want to move that a little bit by
25 agreement, I'm happy to do that.

1 Remember, though, the following week there's a
2 holiday that a lot of us celebrate, the Court included.

3 MR. WARNER: Understood, Your Honor.

4 THE COURT: So otherwise, I'll hope to see you
5 back here by then. If you haven't produced the study --

6 MR. WARNER: Understood.

7 THE COURT: -- if somebody could let me know on
8 Tuesday that it still hasn't been produced, then I'll enter
9 an Order.

10 MR. WARNER: We'll do.

11 THE COURT: Okay. And maybe also let -- I may get
12 you-all in on a conference call to figure out, well, where
13 are we and what kind of Order is needed before I just enter
14 something?

15 MR. WARNER: Okay.

16 THE COURT: All right. Thank you all for being
17 here this afternoon.

18 MALE VOICE: Thank you, Judge.

19 THE COURT: Good luck working out this language.
20 I'll look for the proposed Amended Order here in a couple of
21 hours?

22 MR. WARNER: Yes.

23 THE COURT: Or an hour? Are you getting on a
24 flight?

25 MR. FIELDER: I'm jumping on a flight. How

1 about --

2 THE COURT: In the morning?

3 MR. WARNER: What time is your flight?

4 MR. FIELDER: We can work that out. I don't want
5 to waste the Court's time.

6 THE COURT: Sure.

7 MR. WARNER: It may be morning, Your Honor, but
8 we'll get one filed.

9 THE COURT: All right. So let me ask if you know
10 do I need to stick around here until -- wait till I get one,
11 whatever time it is, or I'll just leave at the normal
12 business hour?

13 MR. WARNER: I would prefer to under-promise and
14 over-deliver.

15 THE COURT: Sure.

16 MR. WARNER: I'd like to tell you that you'll have
17 it by 9:30 tomorrow morning.

18 THE COURT: Perfect. All right. Thank you-all
19 very much.

20 MR. WARNER: All right.

21 THE COURT: You're excused and we're in recess.

22 COURTROOM DEPUTY: All rise.

23 (Proceedings adjourned at 2:14 p.m.)

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* * * * *

1 I certify that the foregoing is a correct
2 transcript to the best of my ability produced from the
3 electronic sound recording of the proceedings in the above-
4 entitled matter.

5 /S/ MARY D. HENRY

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